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To:

Cc:

Subject: FW: DATS Shelter Project

Below is the language that I suggest for the 6662 penalty. This language should work whether the taxpayer DATS is a tax shelter or not, whether the taxpayer is a corporation or not and whether the tax years are before or after the AJCA.

It is determined that, at a minimum, the accuracy-related penalty under Section 6662 of the Internal Revenue Code applies to the underpayment of tax. You have not shown there was reasonable cause for the underpayment and that you acted in good faith or that any other exception to the penalty applies. The penalty shall be imposed on the components of the underpayment as follows:

- A. a 40 percent penalty shall be imposed on the portion of any underpayment attributable to the gross valuation misstatement as provided by Sections 6662(a), 6662(b)(3), 6662(e), and 6662(h) of the Internal Revenue Code.
- B. A 20 percent penalty shall be imposed on the portion of the underpayment attributable to negligence or disregard of rules or regulations as provided by Sections 6662(a), 6662(b)(1), 6662(c) of the Internal Revenue code.
- C. a 20 percent penalty shall be imposed on the underpayment attributable to the substantial understatement of income tax as provided by sections 6662(a), 6662(b)(2), and 6662(d) of the Internal Revenue Code.
- D. a 20 percent penalty shall be imposed on the underpayment attributable to the substantial valuation misstatement as provided by Sections 6662(a), 6662(b)(3), and 6662(e) of the Internal Revenue Code.

Additional comments: Although I have seen SNODs describe the penalty relating to substantial understatement of income tax by having language addressing the transaction as a tax shelter and as not a tax shelter, but I don't think that is necessary. Either approach is covered by the language here. We would have the burden of production to establish DATS as a tax shelter, but I don't think that means that we need to lay out every single element we must prove to be able to get the penalty.

I took out language about substantial authority and reasonable belief more likely than not because that would be relevant only in limited situations (for non-corporate taxpayers for years before the AJCA change) and, in any event, is the taxpayer's burden to prove.

I broke out the penalty because I wanted to mention the 40 percent penalty versus the 20 percent penalty.

I don't know much about the DATS shelter, so I am assuming that the typical shelter would involve valuation misstatements. If I am wrong, please let me know.

Also, where it applies, section 6662A should be the primary penalty. See section 6662(b) flush language and 6662A(e).

I hope this helps.